

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARTHA BERNDT, et al,

Plaintiffs,

**V**

CALIFORNIA DEPARTMENT OF  
CORRECTIONS, et al,

On March 3, 2010, plaintiffs moved to substitute the estate of Judy Longo for the individual claims of deceased plaintiff Judy Longo. Doc #302. On June 3, 2010 the court granted plaintiffs' motion in part, allowing the estate to pursue Longo's section 1983 claim. Doc #343. In conjunction with that order, the court ordered supplemental briefing whether the estate is entitled to pursue Longo's Title VII claim. Id at 4.

1 Longo's Title VII claim. Doc #347 at 2.

2 Defendants maintain that while Title VII may have been  
3 remedial when first enacted in 1964, the compensatory and punitive  
4 damage provisions added in 1991 are penal in nature. Doc #348 at  
5 4. Defendants contend that because Longo sought pain and suffering  
6 damages under the 1991 amendments, as opposed to the traditional  
7 reinstatement and back-pay remedies available since 1964, she is in  
8 effect seeking relief under the "penal" aspects of Title VII and  
9 that her claim is therefore extinguished. Id at 4.

10 The Federal Rules of Civil Procedure allow for the  
11 substitution of parties in certain circumstances, including where a  
12 party dies and her claim is not extinguished. FRCP 25(a)(1). FRCP  
13 25, however, does not resolve the substantive question whether the  
14 claim survives the original plaintiff's death. Robertson v  
15 Wegmann, 436 US 584, 587 (1978). Title VII contains no specific  
16 survivability provisions. 42 USC § 2000e et seq; see also Estate  
17 of Maakestad v Mayo Clinic Arizona, 2006 US Dist LEXIS 55452, \*2 (D  
18 Ariz). As both parties acknowledge, in the absence of a specific  
19 survivability provision, federal common law governs the  
20 survivability of claims that are based on federal statutes.  
21 Heikkila v Barber, 308 F2d 558, 561 (9th Cir 1962); Doc ##347 at 2;  
22 348 at 2.

23 Under common law, a claim does not survive plaintiff's  
24 death if it is based on a statute that is penal in nature;  
25 conversely, claims arising from remedial statutes survive. See  
26 Schreiber v Sharpless, 110 US 76, 80 (1884). In determining  
27 whether a statute is remedial or penal in character, courts employ  
28 a three-factor test which evaluates whether: (i) the purpose of the

1 statute is to redress individual wrongs or more general wrongs to  
2 the public, (ii) recovery runs to the harmed individual or to the  
3 public, and (iii) recovery under the statute is totally  
4 disproportionate to the harm suffered. See Murphy v Household  
5 Finance Corp, 560 F2d 206, 209 (6th Cir 1977); Kilgo v Bowman  
6 Transportation, Inc, 789 F2d 859, 876 (11th Cir 1986).

7         The first factor, whether the statute's purpose is to  
8 redress individual wrongs, favors plaintiffs. Prior to its 1991  
9 amendment, Title VII's remedial nature was well-established. See  
10 Franks v Bowman Transportation Co, 424 US 747, 764-66 (1976)  
11 (discussing Title VII's "make whole" objective); Kilgo, 789 F2d at  
12 876. Contrary to defendants' assertion, the 1991 amendments did  
13 not change the overall nature of Title VII. See Lee v Sullivan,  
14 787 F Supp 921, 933 (ND Cal 1992) (Brazil, MJ); see also Murphy,  
15 560 F2d at 210 (Specific damage provisions will not "convert an  
16 otherwise remedial statute into a penal one."). Defendants here  
17 argue that Longo's claim for pain and suffering is meant to punish  
18 her former employers for their behavior rather than aimed at making  
19 Longo whole. Longo's claim for pain and suffering, however, seeks  
20 to redress an individual wrong. In short, the court finds that  
21 Title VII, including its pain and suffering damages provision,  
22 remains remedial in nature after the 1991  
23 amendment.<sup>1</sup> The first factor, therefore, favors plaintiffs.

24         The second factor, whether recovery runs to the  
25 individual or to the public, also favors plaintiffs. Rather than  
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27 1. Since Longo does not seek punitive damages under Title VII, the  
28 court need not address whether a punitive damage claim might  
survive.

1 to the public, damages recovered for Longo's pain and suffering  
2 claim would flow directly to her (or to her estate).

3         The third factor, whether the recovery authorized by  
4 Title VII is disproportionate to the harm, requires slightly closer  
5 scrutiny. The 1991 amendment authorizes a plaintiff to pursue  
6 punitive damages. 42 USC § 2000e et seq. Punitive damages are a  
7 classic form of recovery disproportionate to harm. See, for  
8 example, Cooper Industries v Leatherman Tool Group, 532 US 424, 432  
9 (2001) (finding that punitive damages "operate as 'private fines'  
10 intended to punish the defendant and deter future wrongdoing"  
11 rather than compensate for harm). But as plaintiffs and defendants  
12 agree, Title VII specifically excludes government entities from  
13 liability for punitive damages. Accordingly, while the result may  
14 differ in cases where plaintiffs seek punitive relief from non-  
15 government entities, the statute does not actually authorize  
16 recovery disproportionate to the harm in this case. See 42 USC §  
17 2000e et seq. Because Title VII only authorizes compensatory  
18 damages, which are proportional to the harm, the third factor thus  
19 also favors plaintiffs. See 2d Restatement of Torts § 903  
20 (American Law Institute 1979) (noting that compensatory damages  
21 "give to the injured person some pecuniary return for what he has  
22 suffered" and "differ from punitive damages, both in the reason for  
23 their existence and in the method for their computation.").

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1 All three factors of the Murphy-Kilgo test having been  
2 satisfied, the court GRANTS plaintiffs' motion to substitute  
3 Longo's estate with respect to her Title VII claim, Doc #302. The  
4 court notes before closing, however, that this order resolves  
5 merely the survivability of plaintiff's claim. It does not address  
6 the question whether the estate may or does state a claim for  
7 relief in this action.

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9 IT IS SO ORDERED.



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11 VAUGHN R WALKER  
12 United States District Chief Judge  
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